Supreme Court, U.S.
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No. 98-1642

IN THE

Supreme Court of the United States

JENNIE STABILE, an individual, and CREATIVE DEVELOPMENT, INC., a Nevada corporation,

Petitioners,

v.

CALIFORNIA FEDERAL BANK,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Second Appellate District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

When judicially-noticed facts demonstrate that the borrower had defaulted under the terms of a real property secured loan, was the lender entitled to exercise its right to foreclose because of the loan defaults?

STATEMENT PURSUANT TO RULE 29.6

Respondent, California Federal Bank, is wholly owned by Golden State Holdings, Inc. so that there are no publicly held companies that own 10% or more of its stock.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties and Rule 29.6 Statement	ii
Table of Contents	iii
Table of Cited Authorities	v
Opinions Below	1
Statement of Jurisdiction	1
Statutes or Other Provisions Involved	2
Statement of the Case	3
Reasons for Denying the Writ	4
I. This Unique Situation Affects No Other Litigants.	4
II. This Situation Involves No Conflicting Opinions.	5
III. The California Court Of Appeal Decision Did Not Involve Federal Bankruptcy Law.	8
IV. The Petition's Due Process Argument Suggests No Basis For Overturning California Substantive Law Regarding The Requisites Of Claims To Set Aside Foreclosure Sales.	9

Contents

Page

V. The Petition Contains Numerous Misstatements. 11

Conclusion 13

TABLE OF CITED AUTHORITIES

Page

Cases:

Abdallah v. United Savings Bank, 43 Cal. App. 4th 1101 (1996) 10

Fidelity Federal Savings v. De La Cuesta, 458 U.S. 141 (1983) 7, 8

In re Worcester, 811 F.2d 1224 (9th Cir. 1987) 10

Karlsen v. American Savings & Loan Assn., 15 Cal. App. 3d 112 (1971) 10

O'Besky v. First Federal Savings & Loan Assn., 678 P.2d 1112, 106 Ida. 339 (1984) 6, 7

Statute:

28 U.S.C. § 1257 2

Rules:

California Rule of Court 977 2

California Rule of Court 977(a) 5

OPINIONS BELOW

The opinion of the California Court of Appeal (Petitioner's Appendix 5a-14a) is unreported.

STATEMENT OF JURISDICTION

The United States Supreme Court lacks jurisdiction because the unpublished California Court of Appeal decision rests on state law grounds.

The challenged decision does not drawn into question the validity of any statute of the United States. The challenged decision does refer to a federal statute, but it does not involve the interpretation or validity of such statute.

The challenged decision rests upon, among other things, the following state law grounds:

(i) California procedural law on the collateral estoppel effect of a prior California Court of Appeal decision in another California proceeding between the same litigants;

(ii) California real property law regarding acceleration of indebtedness;

(iii) California real property law on whether loan defaults are curable;

(iv) California law regarding the procedure for non-judicial foreclosure proceedings; and

(v) California procedural law regarding the requisite elements for a cause of action to set aside a foreclosure sale.

Accordingly, under 28 U.S.C. § 1257, this Supreme Court lacks jurisdiction.

STATUTES OR OTHER PROVISIONS INVOLVED

California Rule of Court 977 states:

> (a) [Unpublished opinions] ***An opinion of a Court of Appeal or an appellate department of the superior court that is not certified for publication or ordered published shall not be cited or relied on by a court or a party in any other action or proceeding except as provided in subdivision (b).***
>
> (b) [Exceptions] Such an opinion may be cited or relied on:
>
> > (1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or
> >
> > (2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding.

> (c) [Citation procedure] A copy of any opinion citable under subdivision (b) or of a cited opinion of any court that is available only in a computer-based source of decisional law shall be furnished to the court and all parties by attaching it to the document in which it is cited, or, if the citation is to be made orally, within a reasonable time in advance of citation.
>
> (d) [Opinions ordered published by Supreme Court] An opinion of the Court of Appeal ordered published by the Supreme Court pursuant to rule 976 is citable.

[Emphasis added.]

STATEMENT OF THE CASE

The Petition for Certiorari (the "Petition") relates to the second case between the same parties over the same loan. In June 1997, the California Court of Appeal issued its ruling in an action (the "Receivership Action"), which began when Respondent California Federal Bank sought a receiver ***before*** it foreclosed on an apartment complex that secured a $1.75 million loan (the "Loan") to Petitioner Jennie Stabile. The Petition concerns the case that Petitioners Stabile and Creative Development, Inc., a Nevada corporation, filed ***after*** foreclosure.

The Receivership Action's appeal was over pre-foreclosure rents the receiver collected before a foreclosure. This action sought to set aside a foreclosure sale of an apartment complex.

In affirming the award of rents to Respondent in the Receivership Action, the California Court of Appeal held

that Respondent was entitled to a receiver because the Loan was in default. In this case, Respondent demurred to the first amended complaint that contested the foreclosure sale and sought to quiet title. The trial court sustained the Respondent's demurrers because judicially-noticeable facts showed that the Petitioners' allegations that the Loan was not in default were meritless. Furthermore, Petitioners had not tendered the amount owing on the Loan despite the necessity of such a tender for claims under California law to set aside a foreclosure sale.

On September 4, 1998, the California Court of Appeal affirmed the trial court's ruling in favor of Respondent in an unpublished decision. The unpublished decision referred to the collateral estoppel effect of the finding in the Receivership Action that the Loan was in default. The Court of Appeal concluded that, as a result of the Loan being in default, it was appropriate for Respondent to proceed with the foreclosure and affirmed the trial court's decision.

On November 24, 1998, the California Supreme Court issued a one-line ruling that the petition for review was denied.

REASONS FOR DENYING THE WRIT

I.

THIS UNIQUE SITUATION AFFECTS NO OTHER LITIGANTS.

The Petition seeks review of an ***unpublished*** decision, by an intermediate California Court of Appeal, that arises from a special set of circumstances that are unlikely to affect any other litigants.

First, under California Rule of Court 977(a), no other party may cite or otherwise rely on an unpublished opinion of a California Court of Appeal.

Second, the foreclosure sale in question followed the appointment of a state court receiver, and findings in a prior proceeding that the underlying loan was subject to multiple defaults.

Third, the Petition concerns a decision that is based in part on the collateral estoppel effect of a prior proceeding. The Court of Appeal's decision states in pertinent part:

> The prior appellate opinion held that the receivership order was a final judgment which collaterally estopped Stabile from relitigating, in that prior appeal, the issue of her default under the Deed of Trust. ***Likewise Stabile is estopped by our prior opinion from relitigating, in the present appeal, the issue of her default.***

[Emphasis added.]

These special circumstances demonstrate that it is unlikely that Supreme Court review of this case would benefit future litigants.

II.

THIS SITUATION INVOLVES NO CONFLICTING OPINIONS.

The Petition asserts that certiorari is necessary to resolve conflicts between the California Court of Appeal's

unpublished decision and opinions of the Idaho Supreme Court and the United States Supreme Court. No such conflicts exist.

First, whether California substantive law conflicts with Idaho's substantive law is not a matter meriting certiorari review.

Second, the unpublished decision does not conflict with the Idaho Supreme Court's decision because the two cases are substantially different. In *O'Besky v. First Federal Savings & Loan Assn.*, 678 P.2d 1112, 106 Ida. 339 (1984), the real property secured loan did not have contract language of the type contained in the loan documents that are the subject of the Petition. The Petition does not address the contract language upon which Respondent proceeded and upon which the California courts relied in ruling in Respondent's favor.

The Deed of Trust that was provided to Respondent in this case contained the following contractual provisions that distinguish this situation from the one in *O'Besky*:

- Deed of Trust ¶ 7 provided that the "Events of Default" include "A Transfer of the Property as defined in Paragraph F below ***without prior written consent*** of Beneficiary."

[Emphasis added.]

- Deed of Trust ¶ F defined "Transfer" as follows: "The sale, transfer, hypothecation, conveyance, alienation, assignment,

> disposition . . . or causing any of the foregoing to occur voluntarily, involuntarily, or by operation of law."

[Emphasis added.]

- Deed of Trust ¶¶ A.(7), F., and 16 provided that: "***any*** encumbrance or transfer of an Interest in the Property ***will materially impair Beneficiary's reasonable security*** hereunder."

[Emphasis added.]

- Deed of Trust ¶ 16.1 provided that: "***Upon any Transfer*** or further encumbrance made in violation of Paragraph 16, Beneficiary ***shall have the absolute right in its sole discretion***, without demand or notice, ***to declare all sums***, indebtedness and obligations secured thereby to be ***immediately due*** and payable."

[Emphasis added.]

In addition to due-on-sale concerns, *O'Besky* is distinguishable because it did not involve other loan defaults such as late payments of principal and interest and unpaid taxes, or the collateral estoppel effect of a prior proceeding's findings that the loan in question was in default.

Third, the Supreme Court's opinion in *Fidelity Federal Savings v. De La Cuesta*, 458 U.S. 141 (1983), does not conflict with the decision at issue. In fact, it actually supports Respondent's position. The Petition cites *De La Cuesta* for the proposition that "the parties may, by their

conduct, opt to include or exclude a due-on-sale clause, and if included specify under what circumstances the due-on-sale clause may be enforced." [Petition at 11.] Moreover, the *De La Cuesta* opinion states in pertinent part:

> . . . the regulation does not empower federal savings and loans to accelerate a loan upon transfer of the security property ***unless the parties to the particular loan instrument, as a matter of contract, have given the lender that right***.

[Emphasis added.] 458 U.S. at 157.

Here, the parties' Deed of Trust did include a due-on-sale clause, and specified when Respondent could enforce it. The California Court of Appeal held that Respondent was entitled to exercise its Deed of Trust rights. Accordingly, no conflict with *De La Cuesta* exists that merits certiorari.

III.

THE CALIFORNIA COURT OF APPEAL DECISION DID NOT INVOLVE FEDERAL BANKRUPTCY LAW.

The Petition asserts that the unpublished decision turned on the Deed of Trust's language that declared a bankruptcy filing a default. [Petition at 15-16.]. However, due to the several defaults under the Deed of Trust, the California Court of Appeal did not need to address whether bankruptcy filings constituted enforceable defaults. Section II of the unpublished decision entitled "Calfed Had Valid Basis to

Exercise Its Due-On-Sale Clause" did not even address the filing of bankruptcy.

The Petition argues that certiorari should be granted on the bankruptcy law issue "since it involves important questions of federal law which have not been, but should be decided by this Court." [Petition at 17.] However, the Petition does not identify any of these supposed important questions.

Accordingly, no bankruptcy issue exists that justifies certiorari.

IV.

THE PETITION'S DUE PROCESS ARGUMENT SUGGESTS NO BASIS FOR OVERTURNING CALIFORNIA SUBSTANTIVE LAW REGARDING THE REQUISITES OF CLAIMS TO SET ASIDE FORECLOSURE SALES.

The Petition argues that the requirement that a party seeking to set aside a foreclosure sale must tender the amount owed on the underlying loan "was arbitrary and unreasonable." [Petition at 19.] However, the Petition does not explain why such a California substantive law requirement is supposedly arbitrary and unreasonable.

The Petition merely repeats the conclusion that the requirement is arbitrary without articulating any basis why it is unconstitutional. [Petition at 20-21.]

The tender requirement is set forth in California case law and is based on equitable principles. One of the opinions

that the California Court of Appeal cited was *Karlsen v. American Savings & Loan Assn.*, 15 Cal. App. 3d 112, 117-118 (1971), which states in pertinent part:

> Respondents assert that even though the trustee sale was voidable, Karlsen cannot invoke the jurisdiction of a court of equity to set aside when the complaint fails to show payment of the obligation for which the property was security or an offer in good faith to pay and that implicit in such offer must be the ability to pay. . . .
>
> ***Equity will not interpose its remedial power in the accomplishment of what seemingly would be nothing but an idly and expensively futile act, nor will it purposely speculate in a field where there has been no proof as to what beneficial purpose may be subserved through its intervention.***

[Emphasis added; citations and quotation marks omitted.]

Numerous federal and other California courts have cited the tender requirement described in *Karlsen*. *See, e.g*, *Abdallah v. United Savings Bank*, 43 Cal. App. 4th 1101, 1109 (1996); and *In re Worcester*, 811 F.2d 1224, 1230 (9th Cir. 1987).

As *Karlsen* explains the basis for the tender requirement, and the Petition suggest no basis to find that is unconstitutional, certiorari should not be granted.

V.

THE PETITION CONTAINS NUMEROUS MISSTATEMENTS.

Certiorari should not be granted because the Petition includes many misstatements and assertions that are not in the record. The Petition contains the following inaccuracies:

• In the list of parties, the Petition says that "petitioner is not a corporation." [Petition at 1.] One of the petitioners is in fact a corporation; namely, Petitioner Creative Development, Inc., a Nevada corporation.

• The Petition refers to cash flow generated by the Property as "the primary income source for the elderly Stabile." [Petition at 5.] Nothing in the record refers to cash flow, to income sources, or to whether Stabile is elderly.

• The Petition asserts that Stabile remained in full control of the Property. [Petition at 6.] This fact is contradicted by the U.S. Bankruptcy Trustee's authority upon the filing of bankruptcies by Stabile and Creative Development, Inc., and the appointment of a State Court receiver.

• The Petition asserts that under California law, Stabile's liability under the Note was unaffected by the transfer of the Property. [Petition at 6.] Under the Note and Deed of Trust, the transfer constituted an event of default which caused the entire indebtedness owing under the Note to be due.

• The Petition asserts that Stabile's "prior attorneys had arrived at a standstill agreement involving Calfed and a subordinate lender." [Petition at 7.] The record does not reflect such fact, and Petitioners voluntarily dismissed a cause of action for breach of oral contract that was based on such an unsubstantiated allegation.

• The Petition asserts that in ¶ 16 of the Deed of Trust, Respondent effectively waived the protection of the Garn St. Germain Act. [Petition at 13.] No such waiver of statutory rights is set forth anywhere in the Deed of Trust, and the Petition ignores the language of ¶ 16 quoted above regarding Respondent's absolute right in its sole discretion to declare all sums, immediately due and payable upon any transfer. Such a right is anything but a waiver of the Garn St. Germain Act's protection of due-on-sale clauses.

• The Petition asserts that Respondent was unaffected by the transfer. [Petition at 14.] That assertion ignores the parties' agreement in the Deed of Trust that any transfer or encumbrance would materially impair Respondent's reasonable security

• The Petition asserts that "if otherwise complying with the terms of the deed of trust, Stabile could have and undoubtedly would have included the subject Property in her Chapter 11 plan." [Petition at 17.] This speculative assertion ignores that numerous types of default under the Deed of Trust that existed including a failure to pay property taxes. Moreover, the record says nothing about what would have been part of a bankruptcy plan if no defaults existed. It should be noted that the bankruptcy court gave Respondent leave from the automatic stay to exercise its Deed of Trust rights, including foreclosure.

• The Petition asserts that a conflict among the states exists regarding Garn St. Germain issues. [Petition at 21.] The Petition does not describe any such conflict, and the underlying appeal did not involve questions about how that act should be interpreted.

• The Petition argues that review should be granted to discourage unethical lender conduct against the elderly. [Petition at 21.] The record does not refer to the elderly or any ethical rule violations. Such an appeal to sympathy is unwarranted in light of the presence in the record of a sophisticated real estate developer and a Nevada corporation, and is irrelevant to whether certiorari should be granted.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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